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September 9, 2002

## RECEIVED

SEP - 9 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

#### Vìa Hand Delivery

Marlene H. Dortch Secretary Federal Communications Commission The Portals TW-A325 445 Twelfth Street, S.W. Washington, D.C. 20554

Re:

Ex Parte Presentation — CC Docket Nos. 02-33, 01-337, 01-338, 98-147, 98-10,

96-98, 95-20

Dear Ms. Dortch:

In accordance with Section 1.1206(b)(1) of the FCC's rules, enclosed for filing please find an original and 16 copies of a written *ex parte* presentation on behalf of EarthLink, Inc. in the above-captioned dockets. Should you have any questions regarding this matter, please feel free to contact the undersigned.

Sincerely,

Kenneth R. Boley

Attorney for EarthLink, Inc.

1750 K Street NW Suite 600 Washington, DC 20006

Kenneth R. Boley bolev@l-olaw.com Tel 202/887-6230 Fax 202/887-6231

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Marlene H. Dortch Secretary Federal Communications Commission The Portals TW-A325 445 Twelfth Street, S.W. Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re:

SBC-Ameritech Predatory Pricing of High-Speed Internet/DSL Service Ex Parte Presentation — CC Docket Nos. 02-33, 01-337, 01-338, 98-147, 98-10, 96-98, 95-20

Dear Ms. Dortch:

In each of the above-referenced proceedings, the Commission is examining the provisioning by Regional Bell Operating Companies ("RBOCs") of wholesale broadband transmission services.¹ EarthLink Inc. ("EarthLink") calls the Commission's attention to a new broadband Internet access service offered by SBC through its ISP affiliate in the Ameritech region, Ameritech Interactive Media Services, Inc. (AIMS). (See attached.) This new offering illustrates how an RBOC, which controls the facilities used for Digital Subscriber Line ("DSL") service, subsidizes its own affiliated ISP to enable predatory pricing designed to harm competing ISPs, including EarthLink. Accordingly, EarthLink, by its attorneys, urges the Commission to recognize that even under current rules, RBOCs can and do operate as monopoly providers of wholesale DSL services and will increase their anticompetitive abuse of monopoly power if regulatory changes so permit.

¹ See, e.g., In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al., Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20, 98-10, FCC 02-42, ¶ 44 (rel. Feb. 15, 2002); In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Notice of Proposed Rulemaking, CC Docket No. 01-337, ¶¶ 25, 28 (rel. Dec. 20, 2001); In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al., Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147, FCC 01-361, ¶ 38 (rel. Dec. 20, 2001).

Ex Parte Presentation — CC Docket Nos. 02-33, 01-337, 01-338, 98-147, 98-10, 96-98, 95-20 September 9, 2002 Page 2

In these proceedings, SBC has aggressively pressed its position that (1) market competition denies it the ability to use DSL provisioning to harm unaffiliated ISPs, and (2) even if it had such ability, it would never use it. As SBC stated in its Comments in the *Wireline Broadband* proceeding,

The existence of [broadband Internet access services] competition negates the need for regulation to prevent potential anti-competitive conduct. SBC currently does business with hundreds of ISPs. It has no desire to discontinue those business relationships. To the contrary, SBC has every incentive to maximize the sale of its broadband services and the use of its network through relationships with unaffiliated information service providers.<sup>2</sup>

In a transparent effort to support this argument, SBC filed a joint submission with the US Internet Industry Association ("USIIA") in which SBC committed "that commercial agreements for broadband Internet access will be available and negotiated between SBC and ISPs in a deregulated broadband market." SBC characterized this commitment as "reflect[ing] the fact that wireline providers and ISPs can and will negotiate market-based agreements to provide sufficient access to wireline broadband facilities, and to ensure efficient, market-based solutions to consumer needs." Conspicuously absent is any commitment that SBC would not use its ability to manipulate the market in conjunction with its new-found freedom to discriminate in order to favor its affiliated ISPs over competing ISPs.

SBC makes no such commitment because it would not adhere to it, as the following facts illustrate.

SBC is offering a complete Internet access service over DSL, called "SpeedPath 768," in the Ameritech region for \$29.95 per month.<sup>5</sup> This price includes not just the DSL transmission

http://www.ameritech.com/DSL\_new/content\_new/1,,18,00.html?SRC=http%3A%2F%2Fsw51

(footnote continued on next page)

<sup>&</sup>lt;sup>2</sup> Comments of SBC Communications Inc., CC Docket Nos. 02-33, 95-20, 98-10 at 28 (May 3, 2002).

<sup>&</sup>lt;sup>3</sup> USIIA and SBC Joint Submission, CC Docket Nos. 02-33, 95-20, 98-10 at 1, Attachment at 2 (May 3, 2002).

<sup>&</sup>lt;sup>4</sup> Reply Comments of SBC Communications Inc., CC Docket Nos. 02-33, 95-20, 98-10 at 25-26 (July 1, 2002).

SBC website screen shots (taken September 9, 2002) are attached hereto. (The URL of the first page in the series is

Ex Parte Presentation — CC Docket Nos. 02-33, 01-337, 01-338, 98-147, 98-10, 96-98, 95-20 September 9, 2002 Page 3

from the end-user's network interface device ("NID") through the SBC DSLAM, but it also includes transport over SBC's ATM network, connection to the SBC-affiliated ISP, the Internet access service itself, the Global Service Provider charge, the DSL modem, and line activation, a total package for which SBC used to charge \$49.95 per month plus initial charges of \$99 for the modem and \$50 for activation. By contrast, the lowest wholesale price SBC charges its affiliated ISP for just the DSL transmission service is significantly higher: \$35.00 per month. Thus, under the SBC-Ameritech offering, the ISPs purchasing at \$35.00 per month must take a \$5.05 loss per customer per month for one year just to get its traffic to the ATM network. Such ISPs still must pay for several additional costs of service, including: access to SBC's ATM network to carry the traffic from the DSLAM to the ISP's PoP; the ISP's own costs of providing its Internet access service (content, Internet backbone service, etc.), and the cost of providing the DSL modem. In other words, SBC is charging independent ISPs significantly more at wholesale for just its DSL transport service than it is charging end-users at retail for the entire, end-to-end Internet access service through its affiliated ISP. As the Commission has explained, "[i]n certain situations, a price squeeze is evident, such as when a monopolist's rates exceed retail rates."

(footnote continued from previous page)

(footnote continued on next page)

<sup>%2</sup>Esbc%2Ecom%2Fctrk%2Fp%2Egif%3F&El=20020828144452C&E=L&Cl=&UI=&EL=&T l=&RI=&RD=).

<sup>6 &</sup>lt;u>Id</u>.

Funder SBC's current wholesale DSL tariff, the lowest price is \$35.00 per month for DSL service providing 384-768 Kbps downstream / 128 Kbps upstream "between the Company's ATM network and the Customer's designated End User premises" and is available only for customers making four-year commitments and guaranteeing over 750,000 new subscribers. SBC Advanced Solutions, Inc., Tariff F.C.C. No. 1, §§ 6.1.1, 6.6 ("SBC-ASI Tariff"). Some ISPs, through the use of Subscription Orders applicable to all SBC territories, purchase the same wholesale DSL service for as low as \$30.00 per month under "grandfathered" provisions from earlier tariffs. See, SBC-ASI Tariff, § Pacific Bell, Access Service, Tariff F.C.C. No. 128, § 17.7.4(A)(7) (eff. August 27, 1999) (ADSL Volume Discount Plan Level D). However, SBC affiliated ISPs are not eligible for such "grandfathering" and must take service under the rates and terms of the SBC-ASI tariff, i.e., the lowest available rate for an SBC-affiliated ISP is \$35/mo. SBC-ASI Tariff, § 2.11.3.

<sup>\*</sup> INFONXX v. New York Telephone Co., Memorandum Opinion and Order, 13 FCC Rcd. 3589, ¶ 18 (1997) ("[P]rice squeeze generally occurs when a vertically integrated company which has monopoly power at the wholesale level, but faces competition from its wholesale customers at the retail level, sets its wholesale rates so high that its wholesale customers are unable to compete in the retail market. In certain situations, a price squeeze is evident, such as when a monopolist's rates exceed retail rates. By definition, a price squeeze determination requires an analysis of two

Ex Parte Presentation — CC Docket Nos. 02-33, 01-337, 01-338, 98-147, 98-10, 96-98, 95-20 September 9, 2002 Page 4

SBC can afford to offer such a retail price only by heavily subsidizing its affiliated ISP. Meanwhile, non-affiliated ISPs have little choice if any for wholesale DSL services. Although cross-subsidization may always provide BOCs and their ISP affiliates a greater profit margin than that achievable by non-affiliated ISPs, it becomes particularly pernicious where, as here, the SBC-affiliated ISP drops its end-to-end retail price significantly *below* the tariffed rates SBC charges competing ISPs for just the wholesale telecommunications inputs. <sup>10</sup>

SBC's behavior is characteristic of a monopoly provider. In a competitive market, such aggressive retail pricing and inflated wholesale pricing would guarantee a mass defection of wholesale DSL customers (i.e. ISPs) to other providers of broadband transmission services. There is only one explanation for SBC's behavior: non-affiliated ISPs have no viable competing provider to which to turn. They are stuck with SBC's overpriced wholesale DSL offering, and SBC knows it. In fact, by pricing its SpeedPath 768 at \$5.05 less than SBC's lowest tariffed price for Wholesale DSL Transport, SBC is sending an unmistakable message to competing broadband ISPs: Stay out of Ameritech territory, or we will squeeze you out.

As noted above, EarthLink offers this example to inform the Commission in its consideration of RBOC market power in the above-referenced dockets. No participant in a competitive market would be able to take such action as SBC has in this case without dire repercussions. However, SBC, like other RBOCs, faces no serious competition in the provision

sets of prices – one at the wholesale level and one at the retail level."). Under well-established Commission precedent, "predatory pricing is 'unjust and unreasonable' and therefore prohibited by Section 201(b) of the Act." In the Matter of PanAmSat Corp., Memorandum Opinion and Order, 12 FCC Rcd. 6952, 6957 (1997).

<sup>(</sup>footnote continued from previous page)

The FCC has found that a facilities-based carrier engages in predatory price squeeze by "pric[ing] below the level of its imputed costs when providing service...." "A price squeeze is a predatory tactic" where a carrier "would set its prices so close to the" input price "that other carriers... could not match the prices without losing money, even if they were more efficient" than the carrier. "Such a strategy would be made possible by the fact that the...carrier controls an essential input for providing service..., and the price charged for that input...is substantially above the economic cost of providing the service." In the Matter of International Settlement Rates, Report and Order on Reconsideration and Order Lifting Stay, 14 FCC Rcd. 9256, \$\quad 26 (1999).

<sup>&</sup>lt;sup>10</sup> Although SBC describes the \$29.95 price as a "Special Offer" that can be accepted only through September 12, 2002, those end-users who do accept the offer will receive that price for a full year. Thus, this is no short-term use of SBC's ability to subsidize its affiliated ISP.

Ex Parte Presentation — CC Docket Nos. 02-33, 01-337, 01-338, 98-147, 98-10, 96-98, 95-20 September 9, 2002 Page 5

of broadband services in its region. Even under today's regulatory structure, SBC feels free to engage in such anticompetitive predatory pricing.<sup>11</sup> EarthLink urges the Commission to protect against this practice in any decision it reaches in the above-referenced proceedings.

In accordance with the Commission's ex parte rules, attached please find 16 copies of this letter for filing in the above-referenced dockets. Should you have any questions regarding this matter, please feel free to contact the undersigned.

Sincerely,

Mark J. O'Connor Kenneth R. Boley

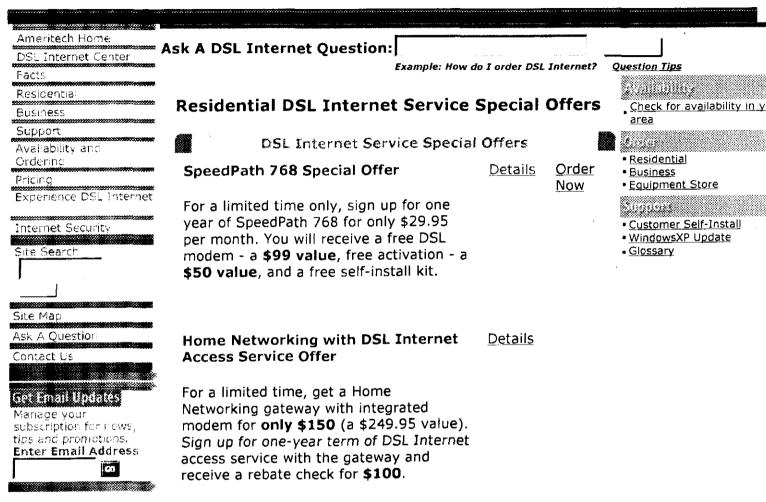
Attorneys for EarthLink, Inc.

Scott Bergmann Chairman Michael Powell cc: Commissioner Kathleen Abernathy Shauti Gupta Cathy Carpino Commissioner Michael Copps Kyle Dixon Commissioner Kevin Martin Dan Gonzales William Maher Jordan Goldstein Marsha MacBride Brent Olson Chris Libertelli Robb Tanner Matthew Brill Pam Arluk Michelle Carey Jeremy Stanshine Jeremy Miller Brad Koerner Simon Wilkie Tom Navin Richard Hovey Robert Cannon Robert Pepper Behzad Ghaffari Jeffrey Carlisle

<sup>&</sup>lt;sup>11</sup> EarthLink notes, however, that the Commission has authority to investigate this matter. "We have ample authority under the Act to conduct an investigation to determine whether rates for DSL services are just and reasonable... and we will address any price squeeze concerns as they arise." In the Matter of GTE Telephone Operating Cos., Memorandum Opinion and Order, 13 FCC Rcd. 22466, ¶ 32 (1998).



### **DSL Internet Center**



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#### **DSI** Internet Center

Question Tips

Check for availability in your

 Customer Self-Install WindowsXP Update

<u>area</u> Residential Business Equipment Store

Glossary

Ameritech Home	Ask A DSL Internet Question:	
DSL Internet Center	Example: How do I order DSL International	tornet?
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	<ul> <li>One dynamic IP address</li> </ul>	
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<sup>1</sup>Requires one-year term agreement; Early termination fee applies. NEW DSL INTERNET SERVICE SUBSCRIBERS ONLY. Offer expires 9/12/02. Terms and conditions subject to change without notice. Other restrictions may apply. DSL Internet Service pricing includes GSP charges and is based on customer self-installation of DSL Internet Service on existing line. Minimum additional charge of \$150 applies if technician install is required. If your line is not eligible for self-installation, or if you choose not to self-install, the installation charge is \$200. DSL Internet Service billing begins when we activate your DSL Internet Service on our network. Service may not be available in some areas due to factors associated with DSL technology such as line conditions or distance. Actual connection speeds will vary. Internet services provided by Ameritech Interactive Media Services, Inc.

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## **DSL Internet Center**

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#### Speedpath 768 Special Offer1

Up to 768Kbps / 128Kbps	\$29.95 (for the first 12 months; price reverts to the standard monthly	One Year	\$0 customer self-install \$200 technician	Free (When you sign up for one year)	Free
	monthly rate after 12 months)		technician install		

install

Order

Order Now

Now

#### **Features**

	Features	
	Subject	Info
Speed Available*	(downstream / upstream)	Up to 768Kbps / 128Kbps
Unlimited Usage		Yes
Dynamic IP Addr	ess	1
Optional DNS Ser	rvices	No
Optional Web Hos	sting	Yes : Go to webhosting.com or call 1-888-WEB-HOST
Ameritech.net En	nail Accounts	5
Personal Home Pa	age account	Yes
Ameritech.net An Account	alog Modem Access	Yes
Ameritech.net Ne	ws Server Access	Yes

<sup>\*</sup> Downstream / Upstream speeds. Service not available in all areas due to factors associated with DSL technology such as line conditions or distance. Actual speeds will vary. Access speed is between customer's location and the DSL Internet-equipped Central Office or Gateway.

<sup>\*\*</sup> Monthly pricing includes GSP charges. Regular voice telephone line and service not included. Other limitations apply. No other discounts apply. DSL Internet Service billing will begin when we have activated your DSL Internet Service on our network. DSL Internet Service is provided by Ameritech Interactive Media Services, Inc.

<sup>\*\*\* \$200</sup> charge for technician installation. \$150 charge for subsequent technician installations on failed customer attempt at self-installation. Maintenance fees of \$120 per jack apply for any additional work required on multiple jacks.

<sup>\*\*\*\*</sup> The cost necessary to process your DSL Internet Service through the Ameritech ordering system.

<sup>&</sup>lt;sup>1</sup>Requires one-year term agreement. Early termination fee applies. NEW DSL INTERNET SERVICE SUBSCRIBERS ONLY. Offer expires 9/12/02. Terms and conditions subject to change without notice. Other restrictions may apply. DSL Internet Service pricing includes GSP charges and is based on customer self-installation of DSL Internet Service on existing line. Minimum additional charge of \$150 applies if technician install is required. If your line is not eligible for self-installation, or if you choose not to self-install, the installation charge is \$200. DSL Internet Service billing begins when we activate your DSL Internet Service on our network. Service may not be available in some areas due to factors associated with DSL technology such as line conditions or distance. Actual connection speeds will vary. Internet services provided by Ameritech Interactive Media Services, Inc. Other product and brand names may be trademarks or registered trademarks of their respective owners.



## **DSL Internet Center**

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		monthly rate after		technician		
		rate arter 12 months)		install		

Order

Now

#### **Features**

Features	
Subject	Info
Speed Available* (downstream / upstream)	Up to 768Kbps / 128Kbps
Unlimited Usage	Yes
Dynamic IP Address	1
Optional DNS Services	No
Optional Web Hosting	Yes: Go to webhosting.com or call 1-888-WEB-HOST
Ameritech.net Email Accounts	5
Personal Home Page account	Yes
Ameritech.net Analog Modem Access Account	Yes
Ameritech.net News Server Access	Yes

<sup>\*</sup> Downstream / Upstream speeds. Service not available in all areas due to factors associated with DSL technology such as line conditions or distance. Actual speeds will vary. Access speed is between customer's location and the DSL Internet-equipped Central Office or Gateway.

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